

Filed 1/8/19 P. v. Moore CA2/1  
Opinion on transfer from Supreme Court

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,	B282836
Plaintiff and Respondent,	(Los Angeles County
v.	Super. Ct. No. YA094020)
CHARLES E. MOORE,	
Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County, Eric P. Harmon, Judge. Affirmed; remanded with directions.

Brad Kaiserman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

Charles E. Moore appealed from the judgment entered on his conviction for residential burglary, with two five-year prior felony sentence enhancements, contending he was deprived of a fair and impartial jury because one of the jurors had himself recently been burglarized. In an opinion filed on July 16, 2018, we concluded the trial court acted within its discretion in retaining the juror. We therefore affirmed the conviction.

Moore sought review from our Supreme Court. While the matter was before the Court the Governor signed Senate Bill No. 1393, which granted trial courts the discretion to strike five-year enhancements imposed under Penal Code section 667, subdivision (a), enhancements that were previously mandatory. (See Sen. Bill No. 1393 (2017-2018 Reg. Sess.) §§ 1-2.) The enactment became effective on January 1, 2019. (See Cal. Const., art. IV, § 8, subd. (c).)

The California Supreme Court granted Moore's petition for review and transferred the cause back to us with directions to vacate our decision and reconsider it in light of Senate Bill No. 1393. We have done so, and now hold that Moore is entitled to a new sentencing hearing wherein the trial court must decide whether to strike the recidivism enhancements. In all other respects, we again affirm the trial court's judgment.

### **BACKGROUND**

In 2016, Moore burglarized a home in Gardena, California by breaking a rear sliding glass door, destroying the security alarm system, and stealing a purse, wallet, jewelry, and credit cards.

At trial, one of the voir dire panel, who was eventually impaneled as Juror No. 4, explained that he had been burglarized

a month before trial. When asked whether he could remain unbiased and fairly judge Moore, he said, “I hope so, yes.”

About a week into trial, Juror No. 4 arrived late and informed the court that he needed a new juror badge, as his truck had been ransacked the night before, and he did not “want to touch . . . the handle to [his] truck to get [his] badge out.” He explained that he suspected someone had gone into his truck and removed a garage door opener, then went into the garage and moved several items to the driveway.

Moore’s attorney moved to have Juror No. 4 excused for cause. The trial court asked Juror No. 4 if he still believed he could remain fair throughout the remainder of the case, to which he responded, “I don’t anticipate it being a problem. I thought I would [have] been remiss [if the recent burglary was not disclosed].” Juror No. 4 stated, “I understand each incident is an individual incident.” When asked by the defense whether the incident was “going to impact in any way your ability to be fair at this time,” Juror No. 4 stated, “I don’t foresee that.”

The trial court found that Juror No. 4 “was clear that the incidents are two separate incidents. He doesn’t believe in any way that Mr. Moore is connected. . . . I think he just wanted to bring it to our attention for the reasons he stated. I don’t think he’s impaired in any way in rendering a just verdict accordingly.” The court therefore denied Moore’s motion to excuse Juror No. 4.

Moore was convicted of residential burglary, and prior conviction allegations were found to be true. He was sentenced to 19 years six months in state prison. (Pen. Code, §§ 459, 667, subd. (a)(1).) He timely appealed.

## DISCUSSION

Moore argues Juror No. 4 was unable to remain unbiased during trial, thus depriving Moore of a fair and impartial jury.

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .” (U.S. Const., 6th Amend.) The California Constitution declares that “[t]rial by jury is an inviolate right and shall be secured to all . . . .” (Cal. Const., art. I, § 16.)

A trial court may “discharge a juror at any time before or after the final submission of the case to the jury if, upon good cause, the juror is ‘found to be unable to perform his or her duty.’” (*People v. Bennett* (2009) 45 Cal.4th 577, 621.) A juror who harbors “actual bias” against a defendant is unable to perform his or her duty. (Code Civ. Proc., § 227, subd. (d).) Actual bias is “the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.” (Code Civ. Proc., § 225, subd. (b)(1)(C); see *People v. Nesler* (1997) 16 Cal.4th 561, 581 [“An impartial juror is someone ‘capable and willing to decide the case solely on the evidence’ presented at trial”].) A juror’s inability to perform “must appear in the record as a ‘demonstrable reality’ and bias may not be presumed.” (*Bennett*, at p. 621.)

That a juror in a burglary trial had himself suffered a burglary either in the past or during trial is not itself grounds for disqualification. (*People v. Martinez* (1962) 206 Cal.App.2d 809, 813-814 [juror was a prior burglary victim]; *People v. Manriquez* (1976) 59 Cal.App.3d 426, 428-429 [juror was the victim of a robbery during trial].)

We review for abuse of discretion a trial court's decision to retain an allegedly biased juror. (*People v. Bennett, supra*, 45 Cal.4th at p. 621.)

Here, Juror No. 4 candidly disclosed burglaries he had suffered before and during trial, and stated he would continue to be fair and understood that "each incident is an individual incident." That he immediately reported the second incident shows that Juror No. 4 desired to fulfill his duty to the best of his ability.

Moore argues that the probability of bias was substantial because Juror No. 4 was victimized by the same type of crime as was alleged against Moore. But the ransacking of Juror No. 4's truck and garage were dissimilar from the crime of which Moore was accused. Unlike Moore, who destroyed both a sliding glass door and a security alarm and stole several items, the burglar of Juror No. 4's truck and garage broke nothing and stole nothing, but simply ". . . went into the garage and pulled out a bunch of stuff." The dissimilarity of the two incidents supports the trial court's conclusion that Juror No. 4 formed no actual bias.

Although Moore speculates that Juror No. 4 was biased and unable to deliver a fair verdict, speculation does not establish a "demonstrable reality" of bias.

We conclude the trial court acted within its discretion in retaining Juror No. 4.

## **II. Resentencing Under Senate Bill No. 1393**

When sentencing Moore, the trial court imposed two mandatory five-year terms pursuant to Penal Code section 667, subdivision (a)(1) upon finding he had suffered two prior serious felony convictions.

On September 30, 2018, the Legislature amended Penal Code section 1385 to remove a provision that prevented a judge from striking prior convictions of serious felonies for purposes of enhancement of a sentence under Penal Code section 667. (Stats. 2018, ch. 1013, § 1 (Sen. Bill No. 1393), effective Jan. 1, 2019.)

An amendment to the Penal Code will not generally apply retroactively. (See Pen. Code, § 3.) However, an exception applies when the amendment reduces punishment for a specific crime. (See *In re Estrada* (1965) 63 Cal.2d 740, 745; accord, *People v. Brown* (2012) 54 Cal.4th 314, 323-324.) Reduction of a punishment indicates the Legislature has “expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act,” and “should apply to every case to which it constitutionally could apply.” (*Estrada*, at p. 745.)

The exception to nonretroactivity extends to amendments that do not necessarily reduce a defendant’s punishment but give the trial court discretion to impose a lesser sentence. (*People v. Francis* (1969) 71 Cal.2d 66, 75-76; see *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 308.)

Moore argues the amendment to Penal Code section 1385 applies retroactively to defendants in his position, and requires that the trial court be given an opportunity to exercise its newfound discretion to strike the recidivism enhancements imposed as part of his sentence. The People concede the point, and we agree. Although the trial court here had no discretion to strike a recidivism enhancement at the time of sentencing, the record is silent as to whether the court might have been open to doing so. Therefore, the matter must be remanded to afford the court an opportunity to exercise its discretion.

### **DISPOSITION**

The conviction is affirmed. The matter is remanded to the trial court to determine whether to strike the enhancement under Penal Code section 667 and if the enhancement is stricken, to resentence defendant.

NOT TO BE PUBLISHED.

CHANEY, Acting P. J.

We concur:

JOHNSON, J.

BENDIX, J.